APPENDIX

COURT OF APPEALS OPINION

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

96-21115

MIRTHA URBANO,
Plaintiff-Appellant,

versus

CONTINENTAL AIRLINES, INC.,
Defendant-Appellee.

Appeal from the United States District Court for the
Southern District of Texas

Before REAVLEY, JONES, and BENAVIDES, Circuit Judges.

EDITH H. JONES, Circuit Judge:

Appellant Urbano challenges the district court's holding that a company policy of granting light-duty assignments only to workers who suffer occupational injuries does not violate Title VII, as amended by the Pregnancy Discrimination Act ("PDA"). Because the PDA protects pregnant women only from being treated differently than similarly-situated non-pregnant employees, it does not guarantee light-duty assignments. We affirm the judgment as a matter of law for Continental Airlines, Inc.

BACKGROUND

In 1990, Mirtha Urbano began working for Continental Airlines in various capacities, most recently as a Ticketing Sales Agent. In that job, she assisted customers with sales and checking-

in passengers and their baggage, often lifting loads in excess of twenty pounds.

In October of 1994, Urbano learned she was pregnant. Shortly thereafter, she began suffering low-back discomfort and went to see her doctor. The doctor ordered her to refrain from lifting anything over twenty pounds for the balance of her pregnancy.

Pursuant to these instructions, Urbano requested to work in a Service Center Agent position, which does not require employees to lift heavy loads. The request was denied because Continental's transitional duty policy grants light-duty assignments only to employees who suffer an occupational injury. Employees with a nonoccupational injury or illness who would like a less physically demanding position must go through Continental's normal duty assignment system, in which employees bid for the positions of their choice, and the positions are assigned by seniority. Continental deemed Urbano ineligible under its policy for a mandatory light duty transfer. Unable to return to work and comply with her doctor's restrictions, Urbano was forced to use her accrued sick days, followed by a ninety-day family leave and then unpaid medical leave.

By March of 1995, Urbano filed charges of discrimination with the E.E.O.C. On March 30, 1995, Urbano received her right-to-sue letter and timely filed suit in federal district court, alleging, *inter alia*, a disparate treatment theory of pregnancy discrimination.

After the district court granted Continental's motion judgment as a matter of law, this appeal followed.[1]

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[1] In addition to her claim of discrimination under the theory of disparate treatment, Urbano challenges the district court's order granting judgment as a matter of law on her claims of disparate impact and retaliatory discharge under the PDA, as well as her claim of retaliatory discharge under the FMLA. We have reviewed the briefs and the pertinent portions of the record and find no reversible error. Urbano did not adduce evidence sufficient to create a genuine issue of material fact on those

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STANDARD OF REVIEW

This court reviews the grant of summary judgment *de novo*, applying the same standards as the district court. *See Duffy v. Leading Edge Prods., Inc.*, 44 F.3d 308, 312 (5th Cir. 1995). Summary judgment is appropriate, when, viewing the evidence in the light most favorable to the nonmoving party, the record reflects that no genuine issue of any material fact exists, and the moving party is entitled to judgment as a matter of law. *See Celotex Corp. v. Catrett*, 477 U.S. 317, 322-24, 106 S. Ct. 2548, 2252-53 (1986); *see also* Fed. R. Civ. P. 56(c). Once the movant carries his burden, "the nonmovant must go beyond the pleadings and designate specific facts showing that there is a genuine issue for trial." *Little v. Liquid Air Corp.*, 37 F.3d 1069, 1075 (5th Cir. 1994).

DISCUSSION

Title VII of the 1964 Civil Rights Act "prohibits various forms of employment discrimination, including discrimination on the basis of sex." *California Fed. Sav. & Loan Ass'n v. Guerra*, 479 U.S. 272, 276-77, 107 S. Ct. 683, 687 (1987). With the passage of the PDA in 1978, Congress amended the definition section of Title VII as follows:

> The terms "because of sex" or "on the basis of sex" include, but are not limited to, because of or on the basis of pregnancy, childbirth, or related medical conditions; and women affected by pregnancy, childbirth, or related medical conditions shall be treated the same for all employment-related purposes, including receipt of benefits under fringe benefit programs, as other persons not so affected but similar in their ability or inability to work ....

42 U.S.C. § 2000e(k) (1994). A claim under the PDA is analyzed like Title VII discrimination claims in general. *See Garcia v. Women's Hosp.*, 97 F.3d 810, 812-13 (5th Cir. 1996).

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claims. Accordingly, we affirm on these issues for essentially the reasons relied upon by the district court.

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To establish a prima facie case of discrimination under Title VII, a plaintiff may prove her claim either through direct evidence, statistical proof, or the test established by the Supreme Court in *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 93 S. Ct. 1817 (1973). The *McDonnell Douglas* test requires the plaintiff to show: (1) she was a member of a protected class, (2) she was qualified for the position she lost, (3) she suffered an adverse employment action, and (4) that others similarly situated were more favorably treated. *See Geier v. Medtronic*, 99 F.3d 238, 241 (7th Cir. 1996) (citing *McDonnell Douglas*, 411 U.S. at 802, 93 S. Ct. at 1824). Once the employer articulates a legitimate, nondiscriminatory reason for the employment action, however, the scheme of shifting burdens and presumptions "simply drops out of the picture," and "the trier of fact proceeds to decide the ultimate question: whether plaintiff has proved 'that the defendant intentionally discriminated against [her]' because of [her sex]." *St. Mary's Honor Center v. Hicks*, 509 U.S. 502, 113 S. Ct. 2742 (1993) (internal citation omitted).

The district court found that Urbano failed to establish the second prong of her prima facie case for disparate treatment. Specifically, the district court held that Urbano could not "provide evidence creating a genuine issue as to whether she was qualified for transfer into a light-duty position, i.e., that she sustained a work related injury." Continental also asserts that Urbano failed to offer evidence that she was treated differently under Continental's policy than other employees with nonoccupational injuries.

We agree.

Continental treated Urbano in exactly the same manner as it would have treated any other worker who was injured off the job. Light duty assignments were at a premium. Each of the forty-eight employees who received a light-duty assignment in 1994 had suffered an occupational injury. Urbano was not denied a light-duty assignment because of her pregnancy, but because her back troubles were not work related. Under the PDA, an employer is obliged to ignore a woman's pregnancy and "to treat the employee

as well as it would have if she were not pregnant." *Piraino v. International Orientation Resources, Inc.*, 84 F.3d 270, 274 (7th Cir. 1996). Thus, Continental was entitled to deny Urbano a light-duty assignment as long as it "treat[s] similarly affected but nonpregnant employees" the same. *Troupe v. May Dep't Stores Co.*, 20 F.3d 734, 738 (7th Cir. 1994); *see also Guerra*, 479 U.S. at 285-86, 107 S. Ct. at 692. Without a showing that Continental adhered to the requirements of the light-duty policy only in cases involving its pregnant workers, Urbano cannot maintain that she was a victim of discrimination under the PDA. *See Rhett v. Carnegie Ctr. Assocs.* (*In re Carnegie Ctr. Assocs.*), 129 F.3d 290, 296 (3d Cir. 1997); *Geier*, 99 F.3d at 242-43; Troupe, 20 F.3d at 738.

Urbano argues that she was physically and mentally qualified to perform the duties required for light-duty assignment, but that Continental's policy of granting light duty only to employees who are injured on the job deprived her of an employment opportunity on the basis of her pregnancy. Under this theory, employees who are unable to perform their regular duties because of their pregnancy will never be able to enjoy the same benefits as employees who suffer occupational injuries, even though these two groups are no different in their ability or inability to work. Urbano concludes that Continental's policy discriminated against her on the basis of her pregnancy and, therefore, violates the PDA.

Appellant relies heavily on the Sixth Circuit's opinion in *Ensley-Gaines v. Runyon*, 100 F.3d 1220 (6th Cir. 1996). At the heart of *Ensley-Gaines* was a Postal Service policy of granting "limited duty" assignments to employees who were injured on the job, and "light duty" assignments to employees with non-work related conditions. Because the "light duty" assignments were granted at the employer's discretion and "limited duty" assignments were granted as employee entitlements, a pregnant employee who received light duty for only a few hours a day challenged the policy as being violative of Title VII. The Sixth Circuit held that a plaintiff establishes a prima facie case of discrimination when she can demonstrate that her employer's

policy treats pregnant women differently than workers who are injured on the job. The Sixth Circuit reasoned that the PDA requires employers to treat pregnant employees in the same manner as they would other employees who were similarly situated with respect to their ability or inability to work. *See id.* at 1226. Because pregnant employees and employees who were injured on the job are no different in their ability or inability to do their work, the latter cannot receive more favorable treatment than the former.

The appellant argues that "[t]he Sixth Circuit's reasoning is sound because it would defeat the very purpose of the PDA to allow an employer to deny pregnant employees opportunities because they could not meet a qualification, that was itself discriminatory." On the contrary, the rule advocated by Urbano and the Sixth Circuit effectuates discrimination contrary to the PDA -- in favor of pregnant employees.

The PDA must be understood in the context in which it was enacted. *See Guerra*, 479 U.S. at 284, 107 S. Ct. at 691. The Supreme Court held in *General Electric Co. v. Gilbert*, 429 U.S. 125, 136-138, 97 S. Ct. 401, 408-09 (1976), that under Title VII, discrimination on the basis of pregnancy was not sex discrimination. In the wake of this decision, Congress passed the PDA, Pub. L. No. 95-555, 92 Stat. 2076 (1978). The PDA amended the definitional provision of Title VII "to specif[y] that sex discrimination includes discrimination on the basis of pregnancy." *Guerra*, 479 U.S. at 277, 107 S. Ct. at 687. In so doing, Congress "unambiguously expressed its disapproval" with the *Gilbert* decision. *Newport News Shipbuilding & Dry Dock Co. v. EEOC*, 462 U.S. 669, 678, 103 S. Ct. 2622, 2628 (1983).

Against this legislative backdrop, most courts have held that the PDA does not impose an affirmative obligation on employers to grant preferential treatment to pregnant women. *See Guerra*, 479 U.S. at 284-86, 107 S. Ct. at 691-92; *In re Carnegie Ctr. Assocs.*; 129 F.3d at 295 ("[Tlhe PDA does not require that employers treat pregnant employees better than other temporarily

disabled employees."); *Lang v. Star Herald*, 107 F.3d 1308, 1312 (8th Cir. 1997) ("[The PDA] does not create substantive rights to preferential treatment."); *Garcia*, 97 F.3d at 813 ("The PDA does not mandate preferential treatment for pregnant women . . . ."); *Armstrong v. Flowers Hosp., Inc.*, 33 F.3d 1308, 1312 (11th Cir. 1994) ("Rather than introducing new substantive provisions protecting the rights of pregnant women, the PDA brought discrimination on the basis of pregnancy within the existing statutory framework prohibiting sex-based discrimination."); *Troupe*, 20 F.3d at 738 ("The Pregnancy Discrimination Act does not . . . require employers to offer maternity leave or take other steps to make it easier for pregnant women to work . . . . "). By defining sex discrimination under Title VII to include pregnancy, Congress intended to do no more than "re-establish principles of Title VII law as they had been understood prior to the *Gilbert* decision," *Newport News*, 462 U.S. at 679, 103 S. Ct. at 2628, and ensure that female workers would not be treated "differently from other employees simply because of their capacity to bear children," *Johnson Controls*, 499 U.S. at 205, 111 S. Ct. at 1206. The Sixth Circuit drew the opposite conclusion without citing any of the opposing circuit court decisions and after distinguishing, unpersuasively, a previous case from its own court. The impact of *Ensley-Gaines* is unequivocally to treat pregnant employees who need light duty work better than other employees with a similar medical need whose conditions arose off-the-job. This is contrary to *Guerra*. 479 U.S. at 291, 107 S.Ct. at 695 (holding that while the PDA does not mandate better treatment for pregnant than nonpregnant employees, it does not pre-empt a state law that "establishes benefits that employers must, at a minimum, provide to pregnant women").

In this case, Continental treated Urbano the same as it treats any other worker who suffered an injury off duty. There is no probative evidence that Continental's distinction between occupational and off-the-job injuries was a pretext for discrimination against pregnant women or that it had a disparate impact on them. Urbano's claim is thus not a request for relief from discrimination, but rather a demand for preferential

treatment; it is a demand not satisfied by the PDA.[2] As long as pregnant employees are treated the same as other employees injured off duty, the PDA does not entitle pregnant employees with non-work related infirmities to be treated the same under Continental's light-duty policy as employees with occupational injuries.

CONCLUSION

For the foregoing reasons, the district court's order granting judgment as a matter of law in favor of the employer is AFFIRMED.

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[2] Indeed it could be argued that granting pregnant employees a benefit men are ineligible to receive is not only not required under the PDA, but it is also not permissible under Title VII, for such a policy would treat a male employee "'in a manner which but for that person's sex would be different.'" *Newport News*, 462 U.S. at 683, 103 S. Ct. at 2631 (quoting *Los Angeles Dep't of Water & Power v. Manhart*, 435 U.S. 702, 711, 98 S. Ct. 1370, 1377 (1978)). The PDA merely specifies that under Title VII an employer must not discriminate on the basis of a women's pregnancy; it does not "erase the original prohibition against discrimination on the basis of an employee's sex." *Newport News*, 462 U.S. at 685, 103 S. Ct. at 2632.

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DISTRICT COURT ORDER

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

MIRTHA URBANO,	§	
Plaintiff,	§	
	§	
versus	§	CIVIL ACTION
	§	NO. H-95-3508
CONTINENTAL AIRLINES,	§	
INC.,	§	
Defendant.	§	

ORDER

Before the Court is Defendant's Motion for Summary Judgment. (Instrument No. 26). After review of the submitted papers and applicable law, the Court finds that the motion should be **GRANTED**.

I.

Plaintiff Mirtha Urbano brings this Title VII action alleging employment discrimination on the basis of sex and other related claims against her former employer, Defendant Continental Airlines.

According to the complaint, Plaintiff began working with Defendant Continental Airlines in July of 1990. (Instrument No. 1). In early October of 1994, Plaintiff was notified by a physician that she was pregnant. At the time, Plaintiff worked as a ticketing agent. Plaintiff's physician prescribed light duty from October 17, 1994 through June 10, 1995, and restricted her from lifting over twenty (20) pounds during that time period. Defendant submits evidence that Plaintiff's position as a Ticket Counter Agent required her to lift at least seventy (70) pounds.

Plaintiff requested that she be transferred to a Service Center Agent position, which does not have the lifting requirement. Defendant has a policy of providing transitional duty positions to employees who have sustained on-the-job injuries. However, the policy does not extend to employees unable to work because of pregnancy. Plaintiff's request was denied, and in early November of 1994, Plaintiff was placed on ninety-day family leave followed by unpaid medical leave until Plaintiffs physician released her from her work restrictions. Plaintiff alleges that she was denied insurance benefits for two months of her family leave. Plaintiff also asserts that on February 6, 1995, she requested and was denied transfer to a reservations position or OnePass department.

Plaintiff filed charges of discrimination with the E.E.O.C. in March of 1995. (Charge of Discrimination signed on 3/7/95, attached as Exhibit E to Plaintiff's Response, Instrument No. 37). Plaintiff received a letter dated March 21, 1995, notifying her of administrative termination of employment effective February 6, 1995.[1]

Plaintiff received notice of right-to-sue on March 30, 1995, and timely filed this action on June 27, 1995. Plaintiff alleges sex discrimination under Title VII, retaliatory discharge, intentional infliction of emotional distress, and violations of the Family Medical Leave Act ("FMLA"), *see* 29 U.S.C. §§ 2601-2654. Defendant's motion addresses all of Plaintiff's claims.

II.

Summary judgment is appropriate if no genuine issue of material fact exists and the moving party is entitled to judgment as a matter of law. Fed. R. Civ. P. 56. A fact is "material" if its resolution in favor of one party might affect the outcome of the suit under governing law. Anderson v. Liberty Lobby, Inc., 106 S.

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[1] Defendant asserts that the termination was in error and that Defendant has offered unconditional reinstatement. Defendant also notes that Plaintiff's child was born last year and Plaintiff has not returned to work with Continental.

Ct. 2505, 2510 (1986). An issue is "genuine" if the evidence is sufficient for a reasonable jury to return a verdict for the nonmoving party. *Anderson*, 106 S. Ct. at 2510. If the evidence rebutting the motion for summary judgment is only colorable or not significantly probative, summary judgment should be granted. *Anderson*, 106 S. Ct. at 2511; *see Lewis v. Glendel Drilling Co.*, 898 F. 2d 1083, 1088 (5th Cir. 1990), *cert. denied*, 112 S. Ct. 171 (1991).

Under Fed. R. Civ. P. 56(c), the moving party bears the initial burden of informing the district court of the basis for its belief that there is an absence of a genuine issue for trial, and for identifying those portions of the record that demonstrate such absence. *Matsushita Elec. Ind. Co. v. Zenith Radio Corp.*, 106 S. Ct. 1348, 1355-56 (1986); *Leonard v. Dixie Well Serv. & Supply, Inc.*, 828 F.2d 291, 294 (5th Cir. 1987).

Where the moving party has met its Rule 56(c) burden, the nonmovant "must do more than simply show that there is some metaphysical doubt as to the material facts . . . [T]he nonmoving party must come forward with 'specific facts showing that there is a *genuine issue for trial*.'" *Matsushita*, 106 S. Ct. at 1356 (quoting Fed. R. Civ. P. 56(e)) (emphasis in original); *Celotex Corp. v. Catrett*, 106 S. Ct. 2548, 2552 (1986); *Leonard*, 828 F.2d at 294. To sustain the burden, the nonmoving party must produce evidence admissible at trial. *Anderson*, 106 S. Ct. at 2514; *Thomas v. Price*, 975 F.2d 231, 235 (5th Cir. 1992) ("To avoid a summary judgment, the nonmoving party must adduce admissible evidence which creates a fact issue. . . . ").

III.

Title VII makes it unlawful for an employer to discriminate against an individual with respect to "compensation, terms, conditions, or privileges of employment . . . because of such individual's . . . sex . . . ." 42 U.S.C. § 2000e-2(a)(1). In 1978, Congress enacted the Pregnancy Discrimination Act ("PDA") to add that "[t]he terms 'because of sex' or 'on the basis of sex'. . . include . . . because of or on the basis of pregnancy, childbirth, or

related medical conditions . . . . " 42 U.S.C. § 2000e(k). The PDA also provides that women affected by pregnancy "shall be treated the same for all employment-related purposes, . . . as other persons not so affected but similar in their ability or inability to work . . . ." 42 U.S.C. § 2000e(k).

Two separate types of discrimination claims have been recognized under Title VII – disparate impact claims and disparate treatment claims. A disparate impact model is used for employment practices that are "facially neutral in their treatment of different groups but . . . in fact fall more harshly on one group than another and cannot be justified by business necessity. *Int'l Bd. of Teamsters v. United States*, 431 U.S. 324, 335 n.15 (1977); *see also Anderson v. Douglas & Lomason Co., Inc.*, 26 F.3d 1277, 1284 (5th Cir. 1994), *cert. denied*, 115 S. Ct. 1099 (1995). In order to establish a disparate impact claim, Plaintiff must identify a specific employment practice "that can be shown to have a causal connection to a class based imbalance in the work force." *Anderson*, 26 F.2d at 1284 (citations and quotations omitted); *see also* 42 U.S.C. § 2000e-2(k)(1)(A).

Plaintiff asserts that Defendant's policy of allowing employees with occupational injuries to transfer to light duty has a disparate impact on pregnant employees. In view of the PDA's goal of ensuring that women affected by pregnancy be treated the same as other persons not so affected but similar in their ability or inability to work, the Court finds that the relevant comparison is between women affected by pregnancy and employees similar in their ability to work who have not sustained on-the-job injuries.

The Supreme Court has emphasized that for disparate impact cases, "statistical disparities must be sufficiently substantial that they raise . . . an inference of discrimination." *Watson v. Fort Worth Bank & Trust*, 487 U.S. 977, 994-95 (1988). Plaintiff offers evidence of forty-eight (48) employees who received transfers to light-duty positions and received medical insurance benefits. However, Plaintiff concedes that, unlike these employees, Plaintiff was denied such privileges because her injuries were not tied to an

occupational injury. Furthermore, Plaintiff offers evidence of only one employee who received a light-duty position and allegedly did not suffer a work-related injury.

Finding no genuine issue as to a disparity between persons affected by pregnancy and others similar in their ability to work who have not sustained on-the-job injuries, the Court concludes that Defendant's motion as to Plaintiff's disparate impact claim must be **GRANTED**.

IV.

In order to establish a prima facie disparate treatment case of employment discrimination, Plaintiff must prove (1) she was a member of a protected group; (2) she was qualified for an employment position; (3) she suffered an adverse employment action; and (4) she suffered from differential application of work or disciplinary rules. *Armstrong v. Flowers Hosp., Inc.*, 33 F.3d 1308, 1315 (11th Cir. 1994) (analyzing pregnancy discrimination claim).

Plaintiff fails to meet the second prima facie element because she does not provide evidence creating a genuine issue as to whether she was qualified for transfer into a light-duty position, i.e., that she sustained a work-related injury. Plaintiff also fails to meet the fourth prima facie element because she does not provide evidence creating a genuine issue as to differential application of the transfer policy. As noted in *supra* part III, Plaintiff offers evidence of only one employee who received a light-duty transfer and allegedly did not sustain a work-related injury.

Finding no genuine issue as to the second and fourth prima facie elements, the Court concludes that Defendant's motion as to Plaintiff's disparate treatment claim must be **GRANTED**.

V.

Plaintiff alleges that Defendant terminated her employment after Plaintiff filed an E.E.O.C. charge of discrimination.

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A prima facie case of retaliation under Title VII exists if the plaintiff establishes that (1) she participated in a statutorily protected activity, (2) she received an adverse employment action, and (3) a causal connection exists between the protected activity and the adverse action. *Mayberry v. Vought Aircraft Co.*, 55 F.3d 1086, 1092 (5th Cir. 1995); *Collins v. Baptist Memorial Geriatric Ctr.*, 937 F.2d 190, 193 (5th Cir. 1991), *cert. denied*, 502 U.S. 1072 (1992). To establish a causal connection, the plaintiff must show that "but for" the protected activity, she would not have been subjected to the adverse action. *Mayberry*, 55 F.3d at 1092; *Collins*, 937 F.2d at 193. The timing of the adverse employment action may be a significant, but not necessarily a determinative factor. *Mayberry*, 55 F.3d at 1092.

Submissions by the parties indicate that on March 7, 1995, Plaintiff signed a charge of discrimination. Defendant received a copy of the charge at its headquarters office on March 20, 1995. The next day, Defendant mailed a notice informing Plaintiff that her employment had been terminated for Plaintiff's failure to contact Defendant at the conclusion of her family leave in February of 1995.

Defendant forwarded a copy of the charge to its operational department on March 22, 1995 for further investigation. The next day, Defendant issued a notice indicating a change in Plaintiff's status from family leave to involuntary medical leave.

Plaintiff has failed to demonstrate a genuine issue as to the third element of a prima facie Title VII retaliation claim, i.e., a causal connection between the filing of Plaintiff's E.E.O.C. charge and the termination notice. Plaintiff has offered no evidence, other than the close timing of the E.E.O.C. charge and the termination letter, indicating that "but for" the filing of the charge, Defendant would not have issued the termination notice. Defendant's evidence indicates that the termination notice was sent in error, and that Defendant subsequently changed Plaintiff's employment status from family leave to involuntary medical leave to reflect that Plaintiff may return to her former position. The Court finds

that Plaintiff's evidentiary showing is insufficient to create a genuine issue as to a retaliatory discharge claim under Title VII.

Defendant's motion as to Plaintiff's Title VII retaliatory discharge claim is **GRANTED**.

VII.

Plaintiff alleges that Plaintiff has violated the Family and Medical Leave Act by "refusing to reinstate Plaintiff to her original job, or to an equivalent job with equivalent pay and benefits . . . ." (Complaint, Instrument No. 1, at 8). Plaintiff also asserts a claim for retaliatory discharge under the FMLA.

Generally, the FMLA provides that "an eligible employee shall be entitled to a total of 12 workweeks of leave during any 12-month period for . . . the birth of a son or daughter of the employee and in order to care for such son or daughter." 29 U.S.C. § 2912(a)(1)(A). Plaintiff does not dispute that she has received ninety days of family/medical leave.

As to the reinstatement claim, Defendant submits evidence that at the time Plaintiff's family leave expired in February of 1995, she was still pregnant and could not perform her original job because of her lifting restrictions. Plaintiff submits no contrary evidence, and also fails to indicate any specific provision of the FMLA requiring such reinstatement.

As to the retaliatory discharge claim, the FMLA makes it unlawful for an employer "to discharge or in any other manner discriminate against any individual for opposing any practice made unlawful by this subchapter." 29 U.S.C. § 2915(a)(2). As to elements of proof, the FMLA provides that "[n]othing in this Act . . . shall be construed to modify or affect any Federal or State law prohibiting discrimination on the basis of . . . sex . . . . 29 U.S.C. § 2651(a). Thus, the Court assumes that the analysis used in Title VII retaliatory discharge claims also applies to Plaintiff's FMLA claim.

To support the FMLA retaliation claim, Plaintiff emphasizes the timing of the administrative discharge in relation to the filing of the E.E.O.C. charge, the fact that Plaintiff was on family leave at the time of the alleged termination, and an unsubstantiated allegation of denial of medical insurance during her family leave. Plaintiff fails to establish a genuine issue as to a causal connection between her administrative discharge and the exercise of any rights provided by the FMLA.

Accordingly, Defendant's motion as to Plaintiff's FMLA reinstatement and retaliation claims is **GRANTED**.

VIII.

As to Plaintiff's claim for intentional infliction of emotional distress, Plaintiff must prove that (1) Defendant acted intentionally or recklessly; (2) the conduct was "extreme and outrageous"; (3) the actions of Defendant caused the Plaintiff emotional distress; and (4) the resulting emotional distress was severe. *Randall's Food Markets, Inc. v. Johnson*, 891 S.W.2d 640, 644 (Tex. 1995); *Twyman v. Twyman*, 855 S.W.2d 619, 621-22 (Tex. 1993). Conduct is considered outrageous if it surpasses all bounds of decency such that it is "utterly intolerable in a civilized community." *Ugalde v. W.A. McKenzie Asphalt Co.*, 990 F.2d 239 (5th Cir. 1993). Even conduct that may be illegal in an employment context may not be the sort of conduct constituting extreme and outrageous conduct. *Id.*

Whether the conduct alleged by Plaintiff may reasonably be regarded as extreme and outrageous is a question of law to be addressed by the Court. *Wornick Co. v. Casas*, 856 S.W.2d 732, 734 (Tex. 1993). A claim for intentional infliction of emotional distress will not lie for mere employment disputes. *Johnson v. Merrell Dow Pharmaceuticals, Inc.*, 965 F. 2d 31, 33 (5th Cir. 1992); *Wornick*, 856 S.W.2d at 734 (wrongful discharge does not support claim for intentional infliction of emotional distress).

Plaintiffs allegations of intentional infliction of emotional distress are in the realm of an ordinary employment dispute and

cannot be said to be "extreme and outrageous." *Wilson v. Monarch Paper Co.*, 939 F.2d 1138, 1145 (5th Cir. 1991). *Compare Ugalde*, 990 F.2d 239 (5th Cir. 1993) (racial slurs and jokes do not rise to level of extreme and outrageous conduct), *Diamond Shamrock Refining & Mktg. Co. v. Mendez*, 844 S.W.2d 198, 202 (Tex. 1992) (falsely depicting plaintiff in the community as a thief does not raise fact issue of outrageous conduct) *and Clayton v. Nabisco Brands, Inc.*, 804 F. Supp. 882 (S.D. Tex. 1992) (that managers over five years were prone to yelling, were rude, accusatory and suspicious, inconsiderate, insulting and unduly critical of employee did not amount to "extreme and outrageous" conduct) *with Wilson*, 939 F.2d at 1145 (demotion of plaintiff who was college educated and had 30 years of executive experience from vice-president to entry level warehouse supervisor whose primary duties were sweeping warehouse and cleaning up after other employees in the warehouse cafeteria was extreme and outrageous conduct designed to humiliate plaintiff).

Moreover, Plaintiff's claim must also fail as a matter of law because Plaintiff has failed to establish that her emotional distress was severe. A plaintiff may recover under this tort only if her emotional distress is so severe that no reasonable person could be expected to endure it. *See Benavides v. Moore*, 848 S.W.2d 190, 195-96 (Tex. App. – Corpus Christi 1992, writ denied). Severe emotional distress does not include mere worry, anxiety, vexation, embarrassment or anger. *Regan v. Lee*, 879 S.W.2d 133, 136 (Tex.App. – Houston [14th Dist.] 1994, no writ). The Court concludes that any distress suffered by Plaintiff is not severe as a matter of law so as to allow recovery for intentional infliction of emotional distress.

Accordingly, Defendant's motion as to Plaintiff's intentional infliction of emotional distress claim is **GRANTED**.

This Order is a **FINAL JUDGMENT**.

The Clerk shall enter this Order and provide a copy to all parties.

SIGNED on this 1st day of November, 1996.

/s/
VANESSA D. GILMORE
UNITED STATES DISTRICT JUDGE

APPENDIX

CONSTITUTIONAL PROVISIONS, STATUTES, AND RULES INVOLVED

UNITED STATES CONSTITUTION

Amendment XIV

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

* * * *

Section 5. The Congress shall have power to enforce, by appropriate legislation, the provisions of this article.

UNITED STATES CODE

Portions of the Family and Medical Leave Act

29 U.S.C. § 2612. Leave requirement

(a) In general

(1) Entitlement to leave

Subject to section 2613 of this title, an eligible employee shall be entitled to a total of 12 work-weeks of leave during any 12 month period for one or more of the following:

(A) Because of the birth of a son or daughter of the employee and in order to care for such son or daughter.

* * * *

(D) Because of a serious health condition that makes the employee unable to perform the functions of the position of such employee.

29 U.S.C. § 2615. Prohibited acts

(a) Interference with rights

(1) Exercise of rights

It shall be unlawful for any employer to interfere with, restrain, or deny the exercise of or the attempt to exercise, any right provided under this subchapter.

(2) Discrimination

It shall be unlawful for any employer to discharge or in any other manner discriminate against any individual for opposing any practice made unlawful by this subchapter.

(b) Interference with proceedings or inquiries

It shall be unlawful for any person to discharge or in any other manner discriminate against any individual because such individual—

(1) has filed any charge, or has instituted or caused to be instituted any proceeding, under or related to this subchapter;

(2) has given, or is about to give, any information in connection with any inquiry or proceeding relating to any right provided under this subchapter; or

(3) has testified, or is about to testify, in any inquiry or proceeding relating to any right provided under this subchapter.

Pregnancy Discrimination Act
(amending Title VII of the Civil Rights Act of 1964)

42 U.S.C. § 2000e. Definitions

For the purposes of this subchapter –

* * * *

(k) The terms "because of sex" or "on the basis of sex" include, but are not limited to, because of or on the basis of pregnancy, childbirth, or related medical conditions; and women affected by pregnancy, childbirth, or related medical conditions shall be treated the same for all employment-related purposes, including receipt of benefits under fringe benefit programs, as other persons not so affected but similar in their

ability or inability to work, and nothing in section 2000e-2(h) of this title shall be interpreted to permit otherwise. . . .

Other Relevant Provisions within Title VII of the Civil Rights Act of 1964

42 U.S.C. § 2000e-2. Unlawful employment practices

(a) Employer practices

It shall be an unlawful employment practice for an employer—

(1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin; or

(2) to limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's race, color, religion, sex, or national origin.

* * * *

(k) Burden of proof in disparate impact cases

(1)(A) An unlawful employment practice based on disparate impact is established under this subchapter only if—

(i) a complaining party demonstrates that a respondent uses a particular employment practice that causes a disparate impact on the basis of race, color, religion, sex, or national origin and the respondent fails to demonstrate that the challenged practice is job related for the position in question and consistent with business necessity; or

(ii) the complaining party makes the demonstration described in subparagraph (C) with respect to an alternative employment practice and the respondent refuses to adopt such alternative employment practice.

(B)(i) With respect to demonstrating that a particular employment practice causes a disparate impact as described in

subparagraph (A)(i), the complaining party shall demonstrate that each particular challenged employment practice causes a disparate impact, except that if the complaining party can demonstrate to the court that the elements of a respondent's decision-making process are not capable of separation for analysis, the decision making process may be analyzed as one employment practice.

(ii) If the respondent demonstrates that a specific employment practice does not cause the disparate impact, the respondent shall not be required to demonstrate that such practice is required by business necessity.

(C) The demonstration referred to by subparagraph (A)(ii) shall be in accordance with the law as it existed on June 4, 1989, with respect to the concept of "alternative employment practice."

(2) A demonstration that an employment practice is required by business necessity may not be used as a defense against a claim of intentional discrimination under this subchapter.

* * * *

(m) Impermissible consideration of race, color, religion, sex, or national origin in employment practices

Except as otherwise provided in this subchapter, an unlawful employment practice is established when the complaining party demonstrates that race, color, religion, sex, or national origin was motivating factor for any employment practice, even though other factors also motivated the practice.

42 U.S.C. §2000e-3. Other unlawful employment practices

(a) Discrimination for making charges, testifying, assisting, or participating in enforcement proceedings

It shall be an unlawful employment practice for an employer to discriminate against any of his employees or applicants for employment, for an employment agency, or joint labor-management committee controlling apprenticeship or other training or retraining, including on-the-job training programs, to discriminate against any member thereof or applicant for membership, because he has opposed any practice made an

unlawful employment practice by this subchapter, or because he has made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or hearing under this subchapter.

(b) Printing or publication of notices or advertisements indicating prohibited preference, limitation, specification, or discrimination; occupational qualification exception

It shall be an unlawful employment practice for an employer, labor organization, employment agency, or joint labor-management committee controlling apprenticeship or otherwise training or retraining, including on-the-job training programs, to print or publish or cause to be printed or published any notice or advertisement relating to employment by such an employer or membership in or any classification or referral for employment by such a labor organization, or relating to any classification or referral for employment by such an employment agency, or relating to admission to, or employment in, any program established to provide apprenticeship or other training by such a joint labor-management committee, indicating any preference, limitation, specification, or discrimination, based on race, color, religion, sex, or national origin, except that such a notice or advertisement may indicate a preference, limitation, specification, or discrimination based on religion, sex, or national origin when religion, sex, or national origin is a bona fide occupational qualification for employment.

42 U.S.C. § 2000e-5. Enforcement provisions

* * * *

(f) Civil action by Commission, Attorney General, or person aggrieved; . . . .

(1) If . . . within one hundred and eighty days from the filing of such charge or the expiration of any period of reference under subsection (c) or (d) of this section, whichever is later, the Commission has not filed a civil action under this section . . . the Commission . . . shall so notify the person aggrieved and within ninety days after the giving of such notice a civil action may be

brought against the respondent named in the charge . . . by the person claiming to be aggrieved. . . .

FEDERAL RULES OF CIVIL PROCEDURE

Rule 56. Summary Judgment

* * * *

(b) For Defending Party. A party against whom a claim, counterclaim, or cross-claim is asserted . . . may, at any time, move with or without supporting affidavits for a summary judgment in the party's favor as to all or any part thereof.

(c) Motion and Proceedings Thereon. . . . The adverse party prior to the day of hearing may serve opposing affidavits. The judgment sought shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law. . . .

* * * *

(e) Form of Affidavits; Further Testimony; Defense Required. Supporting and opposing affidavits shall be made on personal knowledge, shall set forth such facts as would be admissible in evidence, and shall show affirmatively that the affiant is competent to testify to the matters stated therein. . . . The court may permit affidavits to be supplemented or opposed by depositions, answers to interrogatories, or further affidavits. When a motion for summary judgment is made and supported as provided in this rule, an adverse party may not rest upon the mere allegations or denials of the adverse party's pleading, but the adverse party's response, by affidavits or as otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue for trial. If the adverse party does not so respond, summary judgment, if appropriate, shall be entered against the adverse party.